Date Mailed
July 26, 2004

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of the City of Franklin Water Utility to Acquire by Transfer Certain Retail Service Areas, Customers and Water Distribution System Assets Located Within the City of Franklin but Served Retail Water Service by the City of Oak Creek Water and Sewer Utility — 05-BS-124

FINAL DECISION

Introduction

The City of Franklin Water Utility (Franklin) and the City of Oak Creek Water and Sewer Utility (Oak Creek) dispute the right to provide retail water service to 1,600 residential customers in the City of Franklin. Oak Creek currently provides retail service to these Franklin residents pursuant to two 30-year water service agreements between Franklin and Oak Creek and Commission approval. The Commission concludes Oak Creek is required to transfer its Franklin retail customers and the related water distribution assets that Franklin paid for, to Franklin at no cost.

Findings of Fact

1. Oak Creek and Franklin are two adjacent municipalities in southern Milwaukee County sharing a common border.

2. On August 30, 1973, Franklin and Oak Creek entered into a 30-year Retail Water Service Agreement (the Southwood agreement) whereby Oak Creek agreed to supply retail water service to a specific defined residential area along the Franklin–Oak Creek border. The retail water service agreement between Franklin and Oak Creek was designed to provide the

developing eastern portion of Franklin with a Lake Michigan water supply for 30 years until Franklin had the necessary infrastructure to provide the retail water service to its own residents.

3. On October 8, 1973, the Commission approved the Southwood agreement in docket CA-5463. The agreement was to expire October 8, 2003. Franklin agreed to construct, at its expense, all necessary water mains and appurtenances needed for the provisioning of retail service in the Southwood area and then to contribute those assets to Oak Creek so Oak Creek could provide retail service over its own mains. It is PSC policy that a water utility provides retail water service over facilities it owns.

4. On March 21, 1979, Franklin and Oak Creek again entered into a 30-year retail water service agreement (the Rawson agreement) similar in all relevant respects to the Southwood agreement except for termination date and area.

5. On May 10, 1979, the Commission approved the Rawson agreement in docket 4310-WV-1. The agreement was to expire May 10, 2009. Again Franklin agreed to construct and pay for all necessary water mains and appurtenances for the provision of retail water service in the Rawson service area and then to contribute those assets to Oak Creek so that Oak Creek could provide retail service over its own facilities.

6. On April 12, 1994, the City of Franklin submitted an application for authority to purchase wholesale water from Oak Creek (docket 2105-CW-100). The application stated, “It is the intent of this contract together with the attached amendment to terminate the Oak Creek Water Utility’s retail service in the City of Franklin on October 8, 2003. At that time, all Oak Creek Utility retail customers in Franklin would become retail customers of the Franklin Water Utility.” The contract amendment changed the Rawson Agreement termination date from

May 10, 2009, to October 8, 2003, to coincide with the termination date of the Southwood Agreement. The City of Milwaukee intervened in the proceeding and objected to the application on the ground Milwaukee was a better source of wholesale water.

7. On December 28, 1994, the Commission approved Franklin's application. The Commission observed in its Findings of Fact, Conclusions of Law, Certificate and Order that, "The Oak Creek alternative involves transferring some water utility customers. Due to the growth pattern that developed, it was expedient for Oak Creek to provide retail service to about 1,000 customers who reside in Franklin. As stated in the application, these customers will be transferred from Oak Creek, so that they will become retail customers of Franklin by October 8, 2003."

8. Oak Creek was a full party participant in the proceedings that led to the Commission's Order in docket 2105-CW-100. Oak Creek drafted the wholesale water agreement and amendment to the Rawson Agreement that Franklin agreed to and the Commission approved in docket 2105-CW-100. At no point during the proceedings did Oak Creek assert a right to compensation for the contributed assets at the termination of the Southwood and Rawson retail agreements.

9. At no time did Oak Creek object to the Commission's Findings of Fact, Conclusions of Law, Certificate and Order issued in docket 2105-CW-100. Oak Creek has provided lake water to Franklin pursuant to the Wholesale Agreements approved in this docket.

10. Neither the Commission Order in docket 2105-CW-100, nor the record in docket 2105-CW-100, nor the wholesale agreement or its attachment amending the Rawson

retail agreement, make any reference to Oak Creek being compensated for the assets that Franklin paid for and that were to be returned to Franklin on October 8, 2003.

Conclusion of Law

The Commission has jurisdiction over this dispute under Wis. Stat. §§ 66.0815(2), 196.26(lm), 196.37, 196.39, 196.395, 196.49, 196.58(5) and 196.81 and the general provisions of Wis. Stat. ch. 196, Regulation of Public Utilities, to regulate public utility service in the state of Wisconsin including the resolution of disputes between utilities and the commission's ability to interpret its own orders.

Opinion

This case involves a dispute between the City of Franklin Water Utility (Franklin) and the City of Oak Creek Water and Sewer Utility (Oak Creek) over the right to provide retail water service to what are now about 1,600 residential customers in Franklin's Rawson and Southwood areas. Oak Creek currently provides service to these Franklin residents pursuant to two 30-year agreements between Franklin and Oak Creek that the Commission approved in the 1970s. The agreements were originally scheduled to expire on October 8, 2003, and May 10, 2009, respectively. In 1994, Franklin and Oak Creek amended the Rawson Agreement so that both retail agreements would terminate on October 8, 2003.

On December 28, 1994, in docket 2105-CW-100, the Commission approved the wholesale provisioning of Lake Michigan water from Oak Creek to Franklin. As part of that proceeding, the Commission also approved an amendment to the Rawson retail water service agreement which caused Oak Creek's entire retail service in the city of Franklin to end on October 8, 2003.

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The pending dispute regarding the termination of the Rawson and Southwood retail agreements became apparent in early 2003. In a letter dated January 27, 2003, Franklin notified Oak Creek of its expectation that Oak Creek would transfer these customers. Oak Creek acknowledged that a transfer of customers should occur, but claimed financial compensation was due because the Commission's 2001 Contributions in Aid of Construction (CIAC) decision changed the accounting method for contributed assets. In order to avoid a perceived revenue shortfall, Oak Creek demanded financial compensation before transferring the customers and distribution assets to Oak Creek. Although this accounting issue was resolved, Oak Creek raised additional issues before the transfer could occur including the effective date of transfer, approval of a wholesale rate increase, and payment for non-contributed assets "predominately meters."[1]

On July 29, 2003, Franklin filed a formal petition requesting that Oak Creek be ordered to transfer customers and contributed assets at no charge on October 8, 2003, pursuant to the 1994 Order in docket 2105-CW-100. In response, Oak Creek disputed that the 1994 Order required the transfer of distribution assets without consideration.

Both Franklin and Oak Creek ask the Commission to interpret the 1994 Order. Franklin claims that Oak Creek was required to transfer its Franklin customers and related contributed assets at no cost to Franklin on October 8, 2003. Oak Creek claims there was no agreement regarding terms related to infrastructure and that the order requires a transfer of customers by December 28, 2004, *only if* the parties can agree on financial terms regarding the transfer.

[1] Franklin does not dispute its obligation to pay Oak Creek for meters that Oak Creek installed. Oak Creek and Franklin have petitioned for rate increases and proceedings are pending. Franklin filed an application dated July 24, 2003, in docket 2105-WR-105. Oak Creek filed an application dated November 10, 2003, in docket 4310-WR-102.

The Commission finds the case turns on a very straightforward interpretation of the 1994 Order in docket 2105-CW-100. The wording is dispositive and there is no ambiguity. The Order in docket 2105-CW-100 required the transfer of customers. The provisions relevant to the transfer are as follows:

> The Oak Creek alternative involves transferring some water utility customers. Due to the growth pattern that developed, it was expedient for Oak Creek to provide retail water service to about 1,000 customers who reside in Franklin. As stated in the application, these customers will be transferred from Oak Creek, so that they will become retail customers of Franklin by October 8, 2003. (Findings, page 7, paragraph 18).
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> 7. That all of the approximately 1,000 customers in Franklin who are currently receiving retail water service from Oak Creek, will be transferred so that all of these residents become retail customers of Franklin within ten years or sooner as allowed by the agreements between these two municipalities. (Order, page 9.)

The long-standing rule is that agency orders should be given effect if by any reasonable rule of construction they are capable of administration and enforcement. *Madison Bus Co. v Public Service Commission*, 264 Wis. 12, 58 N.W.2d 463 (1953). It is impossible to transfer customers without transferring the related distribution infrastructure from Oak Creek to Franklin. The Order is not conditioned on future agreements or compensation. The date of the transfer is unambiguous and the reference to a longer time period in Order Point 7 is not inconsistent. Under Oak Creek's analysis, Order provisions related to the transfer of customers become meaningless. If the absence of terms in Commission Orders were a basis for further proceedings there would never be finality to Commission orders.

This construction of the 1994 Order is consistent with the manner of interpreting other written documents including court judgments. Unless a court determines that "'the language of

the written instrument is subject to two or more meanings, either on its face or as applied to the extrinsic facts to which it refers' the document is unambiguous." *In re Marriage of Hutjens v. Hutjens*, 2002 WI App 162, ¶ 23, 256 Wis. 2d 255, 647 N.W.2d 448 (citing *Washington v. Washington*, 2000 WI 47, ¶ 26, 234 Wis. 2d 689, 611 N.W.2d 261). This construction of the Order gives meaning to all provisions and is preferable to one that creates surplusage.

While it is not necessary to rely upon other evidence to interpret an unambiguous Order, it is worthwhile to point out that the plain meaning of the 1994 Order is corroborated by extrinsic evidence of the parties' intent. There are specific references in the documentary record that retail service *will be* transferred to Franklin without conditions. The transfer was directly referenced in the 1994 application which was supported by Oak Creek. The coordination of the return of all Franklin customers by Oak Creek at the conclusion of the 1973 agreement was an incentive for Franklin to enter into the wholesale agreement with Oak Creek (instead of Milwaukee). As a consequence, the term of the 1979 agreement was shortened to coincide with the 1973 agreement and amended to expire on October 8, 2003.

Furthermore, the cost of repurchasing infrastructure was not considered in the 1994 proceeding that compared Franklin's anticipated cost of wholesale supply from Milwaukee and Oak Creek with other alternatives that did not include the transfer of Southwood and Rawson Water Utility infrastructure. The record in this proceeding does not show Oak Creek had asserted a right to payment before 2003. Prior to hearing, Oak Creek merely had asserted the right for payment of meters and the right to payment "to compensate for its loss of rate base."

Upon termination of the retail contracts between Franklin and Oak Creek, Oak Creek's right to provide basic water service to approximately 1,600 residential customers living within

Franklin's municipal borders will end. Upon termination, it is undisputed that Franklin has the obligation to provide retail service through its municipal water utility. By refusing the unconditional transfer of infrastructure, Oak Creek is precluding Franklin from fulfilling its obligation.

Oak Creek argues that the retail service agreements do not set out precise terms for transferring retail customers. Although the 1994 Order was based in part upon the Southwood and Rawson Agreements, the force and effect of the 1994 Order is independent of the validity of these agreements. *City of Milwaukee v. City of West Allis*, 236 Wis. 371, 294 N.W. 625 (1940). The 1994 Order did not require payment to Oak Creek as a condition for the transfer of customers to Franklin.

Oak Creek's position is also contrary to Wis. Stat. § 196.395 that provides "[i]f an order is issued upon certain stated conditions, any party acting upon any part of the order shall be deemed to have accepted and waived all objections to any condition contained in the order." Following the 1994 Order, Oak Creek acted upon the Order and provided wholesale water service to Franklin. By acting in accordance with the Order, pursuant to Wis. Stat. § 196.395, Oak Creek effectively waived any objection to the Order's condition that "all of the approximately 1,000 customers in Franklin who are currently receiving retail water service from Oak Creek, will be transferred so that all of these residents become retail water customers of Franklin within ten years or sooner as allowed by the agreements between the two municipalities."

The application of Wis. Stat. § 196.395 to preclude Oak Creek from receiving compensation is consistent with the judicial principle of judicial estopple. Commission staff

testified that Oak Creek's position in this proceeding was a significant departure from and inconsistent with its position in the 1994 proceeding and earlier proceedings that approved the retail service agreements.

The judicial estoppel doctrine "'precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position.'. . . In Wisconsin, the doctrine is used to prevent litigants from playing 'fast and loose with the judicial system' by maintain[ing] inconsistent positions during the course of the litigation.'" *Salverson v. Douglas County*, 2001 WI 100, ¶ 37, 245 Wis. 2d 497, 630 N.W.2d 182 (quoting *State v. Petty*, 201 Wis. 2d 337, 347, 348, 354, 548 N.W.2d 817 (1996)). The three required elements include: "(1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position." *Salveson v. Douglas County*, 245 Wis. 2d 497, ¶ 38.

As applied to this proceeding, Oak Creek's current position is "clearly inconsistent" with its position in 1994. Because Oak Creek unconditionally supported the approval of the Franklin/Oak Creek wholesale agreement and amendment of the Rawson retail agreement (including customer transfer by October 8, 2003), Oak Creek properly is barred from seeking compensation.

Assuming *arguendo* that contract law principles apply as Oak Creek contends, an examination of the retail service agreements warrants the same conclusion. The 1973 and 1979 retail service agreements expressly set a termination date without regard to compensation. In 1994, Oak Creek and Franklin amended one of the contracts to coordinate the termination dates. The amendment did not identify additional terms regarding the transfer of customers. There is

no evidence that the parties intended to include compensation in the contracts. There is no evidence that failure to include that provision was due to a mutual mistake of the parties. *Frantl Industries v. Maier*, 68 Wis. 2d 590, 591-592, 229 N.W.2d 610, 611 (1975).

In essence, Oak Creek suggests that silence of these agreements regarding compensation means that the transfer of customers was not addressed. Oak Creek reads the contracts' omission of terms to be an open-ended, lack of "meeting of the minds." According to Oak Creek, the Commission should reject the obvious conclusion that the absence of terms indicates that the parties have excluded this issue from the agreement.

Oak Creek's position is contrary to a basic principle of contract interpretation that a written contract embodies the final and entire agreement of the parties. 17A Am. Jur. 2d *Contracts* § 389 (1964). Courts, therefore, have been highly reluctant to read contractual silence to indicate that the parties' mutual agreement is incomplete or ambiguous. *Indiana Glass Co. v. Indiana Michigan Power Co*., 692 N.E.2d 886, 887 n.1 (Ind. Ct. App. 1998) (absence of terms regarding the recovery of attorney's fees does not render the contract ambiguous). *Kirschten v. Research Institute of America*, No. 94 Civ. 7947, 1997 WL 739587, at *10 (S.D.N.Y. Sept. 24, 1997) (silence does not constitute ambiguity). In general, contractual ambiguity "does not arise from silence, but from what was written so blindly and imperfectly that its meaning is doubtful." 17A Am. Jur. 2d *Contracts* § 331 (1964).

Wisconsin courts have defined contractual ambiguity in such a way that it involves contractual language and not an *absence of* contractual language. In *Borchardt v. Wilk*, 156 Wis. 2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990) the court of appeals held that "a contract is ambiguous when its terms are reasonably or fairly susceptible of more than one

construction." Importantly, this definition recognizes that ambiguity results from conflicting meanings for specific terms, not the absence of language. The plain language of the retail service agreements, presumed to encompass the entire agreement of the parties, should be read as it stands. These agreements plainly include no mention of future compensation for infrastructure.

In summary, the Commission concludes that the plain meaning of the 1994 Order requires Oak Creek to transfer customers without consideration and that this conclusion is supported by an analysis of the retail service agreements under contract law principles. A consideration of the value of the infrastructure based on the record leads to the same result.

Assuming *arguendo* that Oak Creek were entitled to compensation for infrastructure, the inquiry would turn to the amount of consideration to be paid by Franklin. Oak Creek's water utility manager refused to provide a basis for determining compensation due Oak Creek arguing instead that the effect on the utility's cash flow should be controlling. However, utility infrastructure valuation depends upon accounting principles.

If the Commission were to require payment for the contributed assets that are to be transferred back to Franklin according to its standard evaluation method, the book value for those assets would be zero. Contributed assets do not have book value to municipal water utilities. *City of St. Francis v. Public Service Commission*, 270 Wis. 91, 98-99, 70 N.W. 221 (1955). This approach is consistent with the Commission's 2001 decision on the accounting treatment for Contributions in Aid of Construction in docket 05-US-105. In this decision, the Commission revised its long-held practice of allowing municipalities to depreciate contributed assets. The Commission viewed the historical ratemaking method as requiring customers "to pay

for the contributed plant twice, once when contributing the plant and again when depreciation expense on contributed plant is included in customer rates." (Public Service Commission of Wisconsin, 05-US-105, March 30, 2001, p. 3.) In this proceeding, the result urged by Oak Creek is even more extreme because Franklin ratepayers would be forced to pay Oak Creek for assets that Franklin had paid for originally.

In 1931, the Wisconsin legislature gave the Commission the authority to certify depreciation rates with the enactment of Wis. Stat. § 196.09. Soon after, the Commission established itself as an "original cost depreciated" state as a valuation principle for municipal utility assets and has since consistently applied this principle. Property or plant used for utility purposes is recorded on utility books at its original cost. All the necessary water mains and appurtenances that Franklin paid for and then contributed to Oak Creek have, to Oak Creek, a net cost of zero. The value of the property that Oak Creek is now required to transfer to Franklin has a value of zero.

In the 1970s, Franklin paid for the water mains that service the Rawson and Southwood neighborhoods. Until the change in CIAC in 2001, these customers paid depreciation expense allocated to these assets as part of Oak Creek's rate structure. Oak Creek's demand for additional consideration would have these Franklin customers pay a third time for this infrastructure. This outcome would be manifestly unfair and contrary to the public interest.

Order

The City of Oak Creek Municipal Water and Sewer Utility shall transfer all of its Franklin retail customers and the related contributed water utility infrastructure at no cost to the City of Franklin Municipal Water Utility within three months of the date of this order.

Dated at Madison, Wisconsin, _____

By the Commission:

_____
Lynda L. Dorr
Secretary to the Commission

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See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

COMMISSIONER ROBERT GARVIN
DISSENTING OPINION
Docket 05-BS-124
July 22, 2004

I respectfully dissent because I do not agree that either the plain meaning of the Commission's 1994 Order or an application of contract law principles requires Oak Creek to transfer infrastructure to Franklin at no additional compensation. Although the Order unambiguously requires Oak Creek to transfer customers by October 8, 2003, the order is silent regarding a critical matter in this proceeding—the arrangements or compensation associated with the transfer of infrastructure. I am not persuaded by the majority's reliance upon extrinsic evidence regarding the 1994 Order to corroborate the determination that "transfer of customers" necessarily implies the transfer of related infrastructure at no additional cost. Furthermore, I am not persuaded that the contact law analysis supports this result.

The Rawson and Southwood Retail service agreements are silent on the subject on the amount of compensation Oak Creek may be entitled when the contracts expired according to their terms. In the name of interpreting the agreements, the Commission simply cannot—just as courts cannot—insert what has been omitted or effectively rewrite the agreements made by the parties. *Batavian Nat. Bank of La Crosse v. S. & H. Inc.*, 3 Wis. 2d 565, 569, 89 N.W.2d 309, 312 (Wis.1958). I find no statutory basis for this Commission to equitably reform this contract, revise the parties agreement and insert terms that were not included. The Commission must follow the rule that contracts must be construed as they are written. *Amcast Indus. Corp. v. Affiliated FM Ins. Co.*, 221 Wis. 2d 145, 164, 584 N.W.2d 218, 226 (Wis. Ct. App. 1998).

Franklin began this proceeding by petitioning for entry of an Order to compel Oak Creek to transfer customers. The record in this matter consists primarily of opinion testimony concerning the parties' intent regarding the agreements that were approved in 2105-CW-100.

Instead of resolving this dispute through interpretation of the Order, a more appropriate process to resolve the compensation issue associated with these facilities would involve re-opening this record or opening a new proceeding to address whether Franklin is entitled to obtain the infrastructure for its customers at no additional cost. Because Franklin has the right and obligation to serve these customers, common sense would suggest that it is entitled to acquire the underlying infrastructure. This procedural approach would provide a better framework to resolve this dispute on this issue. At the end of this process the record may well document that Oak Creek is not entitled to consideration, but Oak Creek would have had the opportunity to demonstrate evidence to support its claim.

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Robert M. Garvin
Commissioner

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